UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA U.S. Department of Justice Antitrust Division 325 Seventh Street, N.W. Suite 500 Washington, DC 20530 Plaintiff, **v.** **ENOVA CORPORATION** 101 Ash Street San Diego, CA 92101 Defendant.	)	Civil Action No. 98-CV-583 (TFH) Filed:

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to prevent the proposed merger of Pacific Enterprises ("Pacific"), a California natural gas utility, and Enova Corporation ("Enova"), a California electric utility company. As a result of the merger, Pacific and Enova ("PE/Enova") would have both the incentive and ability to lessen competition in the market for electricity in

California. As a result, consumers in California are likely to pay higher prices for electricity.

I.

NATURE OF THE ACTION

1. Enova is a major provider of electricity in southern California, with approximately $1.6 billion in electricity sales.   It sells electricity from plants that use coal, gas, nuclear power and hydropower.

2. Pacific, through its wholly owned subsidiary Southern California Gas Company, is virtually the sole provider of natural gas transportation and storage services to plants in southern California that use natural gas to produce electricity (“gas-fired generators or "gas-fired plants”). Pacific can control the supply and thus the price of gas to consumers, which gives Pacific the ability to increase the cost of operating particular power plants.

3. Gas-fired plants in general are the most costly power plants to operate and consequently are the last generators to be turned on to meet consumer demand for electricity. Operating about 30-50 percent of the year, primarily during periods of high demand for electricity, their costs set the price for all electricity sold during these peak periods in California. As a result, a company that can raise the cost of these plants, by, for example, raising the price of fuel to these plants,

can raise the price of all electricity in California. Because of the way electricity will be sold in California, a company that owns lower cost electric generating plants will benefit from conduct that raises the price of electricity because raising the price of electricity will raise the profit made by lower cost plants without the risk of losing sales to price-sensitive customers.

4. If the proposed transaction is consummated, PE/Enova will have both the incentive and ability during high electric demand periods to use its natural gas monopoly to limit the supply of natural gas, which will increase the costs of competitive, gas-fired electric generating plants and thereby lessen competition and increase prices for all electricity in California. Accordingly, the proposed acquisition is likely to lessen competition substantially in the market for electricity in California, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C.A. § 18.

II.

JURISDICTION, VENUE, AND DEFENDANT

5. This action is filed pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C.A. § 25, to prevent and restrain the violation by the Defendant, as hereinafter alleged, of Section 7 of the Clayton Act, as amended, 15 U.S.C.A. § 18.

6. Pacific and Enova are engaged in interstate commerce and in activities substantially affecting interstate commerce. Pacific receives gas from interstate pipelines and transports it throughout California. Enova conducts transactions involving natural gas and electric power throughout the Western and Southwestern United States.

7. Enova is a California corporation headquartered in San Diego, California. It is the parent of San Diego Gas and Electric company, which is the third largest provider of electricity in southern California, and had revenues of about 1.9 billion dollars in 1996. Enova consents to jurisdiction in the District of Columbia for the purposes of 15 U.S.C.A. § 22 and 28 U.S.C.A. § 1391(c).

8. The Court has jurisdiction over the subject matter of this action and jurisdiction over the parties pursuant to 15 U.S.C.A. §22 and 28 U.S.C.A. §§ 1331 and 1337. Venue is proper pursuant to 28 U.S.C.A. § 1391(c).

III.

THE TRANSACTION

9. Under an Agreement and Plan of Merger and Reorganization dated October 12, 1996 (the "Merger Agreement"), Enova and Pacific will each become wholly owned subsidiaries of a common holding company parent. Under the

Merger Agreement, the merger of Enova and Pacific will occur as soon as all state and federal regulatory approvals have been obtained.

IV.

TRADE AND COMMERCE

10. As a result of a legislatively mandated restructuring, the California electric power market will experience significant changes in 1998. After the regulatory changes take effect, most electricity generated in California will be bought and sold through the California Power Exchange ("the pool"), a central, computerized bidding system that will match electricity supply and demand during every half-hour period during the day. The regulations require regulated utilities to buy and sell all their electricity through the pool.

11. With the pool, all sellers of electricity will send in bids for every half hour in which they want to sell electricity. Similarly, all buyers of electricity will send in bids for every half hour in which they wish to buy. The pool will distribute power until all demand is met. The price per unit of electricity for any given half hour will be determined by the most expensive unit sold that half hour with all sellers receiving that price, regardless of their costs or their bids. (Nuclear-powered generators will receive regulated rates for four years after the California pool begins operation.)

12. Currently, regulated electric utilities sell over 80 percent of all retail electricity in California. Because these utilities must buy all of their electricity from the pool, the pool prices -- the price the utilities pay for the electricity they distribute -- will directly affect the price most consumers in California pay for electricity.

13. California experiences predictable patterns of high and low electricity demand throughout the year. Peak electricity demands occur during the summer when consumer use of air conditioning and other electric-powered appliances increases.

14. Electricity sold in California is generated from power plants using one of four fuels, gas, coal, hydropower and nuclear, and the costs of generating electricity from these plants differs significantly. Although certain gas-fired plants are more efficient than others, gas-fired plants are in general the most costly to operate. Because they cost the most to operate, the gas-fired plants will bid the highest prices into the pool and are the last ones to be turned on to meet consumer demand for electricity. They operate about 30-50 percent of the time, primarily during periods of high electric use.

15. The state of California has granted Pacific a monopoly of transportation of natural gas within southern California. Pacific also has a

monopoly of all natural gas storage services throughout California. Natural gas transportation and storage services include (1) physically moving natural gas from natural gas deposits to various end users, including commercial and industrial users and (2) storing natural gas at facilities from which end users can readily access natural gas stockpiles.

16. Pacific, although regulated by the California Public Utilities Commission ("CPUC"), has the ability to restrict the availability of gas transportation and storage to consumers, by limiting their supply or cutting them off entirely, which has the effect of raising the price they pay for natural gas.

V.

THE RELEVANT MARKET

17. Consumers of electricity in California cannot and do not switch to other products in response to an increase in the price of electricity.

18. There is limited electricity transmission capacity into California. During periods of high demand, the transmission lines into California are fully loaded, making it impossible to send additional electricity into California from any outside location.

19. The provision of electricity in California during high demand periods is a relevant market (i.e., a line of commerce and a section of the country) under Section 7 of the Clayton Act.

VI.

ANTICOMPETITIVE EFFECTS

20. Pacific has the ability to increase the costs of electricity from gas-fired generators. It can restrict generators' access to gas, raising their costs, or limit the supply to the more efficient gas generators, requiring reliance on higher-cost generators to meet consumer demand for electricity. Gas-fired power plants in California are dependant on Pacific for transportation or storage services, and they cannot and do not switch to other fuels in response to price increases in pipeline or storage services.

21. During periods of high electric demand, gas-fired generators will supply the most expensive units of electricity sold in the pool, thus setting the price for all electricity sold. Increasing particular generators' costs or cutting off their gas supply completely will make it more difficult and expensive for them to compete to sell electricity in the pool. The result is an increase in the price of electricity sold.

22. Pacific currently owns no electric generation plants to give it an incentive to limit its gas transportation sales or storage or to raise the price of gas to any electric utilities in order to increase the price of electricity.

23. Enova, as a potential seller of over 2600 MW of electricity into the pool, some of it from lower cost plants that run most of the time, would benefit from an increase of the price of electricity sold through the pool. Enova, because it does not currently own a natural gas pipeline, currently has no ability to increase the costs of competing electric utilities and the price of electricity sold by them.

24. Once Pacific's pipeline is combined with Enova's low cost electricity generation facilities, PE/Enova would have the ability to raise the pool price of electricity either by (a) limiting the availability of natural gas to competing gas-fired plants that supply the most expensive units of electricity into the pool, or (b) by limiting gas or gas transportation to gas-fired plants that are more efficient and would otherwise have kept the pool price for electricity down. PE/Enova would have the incentive to raise the pool price after the merger because, through its ownership of low cost generation facilities, it could profit substantially from any increase in the pool price of electricity and its incremental profits would more than offset any losses of gas transportation sales that would result from withholding gas from competing gas-fired plants. PE/Enova thus will have the incentive and ability

to lessen competition substantially and increase the price of electricity in California during periods of high demand.

VII.

ENTRY

25. Entry into either the market for intrastate natural gas transportation and storage in California or the market for electric generation in California would not be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract an anticompetitive price increase.

26. The CPUC's regulatory scheme makes it economically impossible for alternative suppliers of natural gas transportation to enter the California market. California's pipeline certification process discourages entry by intrastate firms, while its restrictions on access to intrastate gas transportation markets discourages entry by interstate pipelines. Entry into gas storage requires access to appropriate geologic formations, such as drained aquifers and abandoned gas fields and salt mines, which, in California, are all owned by Pacific.

27. Entry into electric generation could counteract a post-merger price increase only if the entrants provided significant generation capacity and were not dependant on natural gas to generate electricity. Entry by building new hydro powered, coal-fired, or nuclear-powered generators is highly unlikely, however.

Each of these face substantial environmental, safety, and other regulatory barriers that would make entry costly, time consuming and uncertain. Similarly, entry by building new lines to transmit electricity from outside California requires myriad environmental, safety and zoning approvals, which would be difficult, costly, and time-consuming to obtain.

VIII.

<u>VIOLATION ALLEGED</u>

28. Unless restrained, the proposed transaction will be likely to substantially lessen competition in violation of Section 7 of the Clayton Act, in the following ways:

a. competition in the market for electricity in California during high demand periods may be substantially lessened;

b. prices for electricity to consumers in California during high demand periods are likely to increase.

IX.

<u>REQUEST FOR RELIEF</u>

The United States requests (a) adjudication that the proposed merger of Pacific and Enova would violate Section 7 of the Clayton Act; (b) preliminary and permanent injunctive relief preventing the consummation of the proposed merger;

(c) an award to the United States of the costs of this action; and (d) such other relief as is proper.

Dated:

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Joel I. Klein
Assistant Attorney General

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A. Douglas Melamed
Principal Deputy Assistant Attorney General

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Constance K. Robinson
Director of Merger Enforcement
Antitrust Division

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Roger W. Fones
Chief, Transportation,
Energy & Agriculture Section

____
Donna N. Kooperstein
Assistant Chief, Transportation
Energy & Agriculture Section

____
Jade Alice Eaton
Andrew K. Rosa
Attorneys
U.S. Department of Justice
Antitrust Division
325 Seventh St., N.W.
Suite 500
Washington, DC 20530
Telephone: (202) 307-6475
Facsimile: (202) 307-2784